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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, V. RAYMOND CARRILLO, Defendant and Appellant.	F070459 (Super. Ct. No. 13CM2192) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Steven D. Barnes, Judge.

Linda M. Leavitt, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez, Amanda D. Cary and Nora S. Weyl, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

From the passenger seat of a moving car, defendant Raymond Carrillo fired three gunshots into the rear window of another vehicle carrying four people. No one was injured in the shooting, and defendant was subsequently convicted by jury of one count of the attempted murder of Edgar Robledo (Pen. Code, §§ 664/187, subd. (a)) (count 1)[1] and one count of shooting at an occupied motor vehicle (§ 246) (count 2). The jury found true the special allegation that the attempted murder was willful, deliberate and premeditated (§ 189), the gang enhancement attached to counts 1 and 2 (§ 186.22, subd. (b)(1)(C)), and the enhancements for personal use of a firearm (§ 12022.53, subd. (c), (count 1) and § 12022.5, subd. (a), (count 2)). The jury also found true that defendant suffered a prior conviction for violation of section 186.22, subdivision (a), a serious and/or violent felony within the meaning of the Three Strikes law.[2] (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d).)

On count 1, the trial court sentenced defendant to an indeterminate term of 15 years to life based on the gang enhancement (§ 186.22, subd. (b)(5)), doubled to 30 years to life for the prior strike, plus a determinate term of 20 years for the firearm enhancement. On count 2, defendant was sentenced to an indeterminate term of 15 years to life based on the gang enhancement (§ 186.22, subd. (b)(4)(B)), doubled to 30 years to life for the prior strike. The court ordered the sentence on count 2 to run concurrently with the sentence on count 1.

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1 All further statutory references are to the Penal Code unless otherwise specified.

2 This conviction also formed the basis of the prior prison term enhancement allegation set forth in the amended information. (§ 667.5) Although the trial court instructed the jury on the prior prison term allegation, the verdicts returned by the jury did not include this finding and it appears it may have been inadvertently omitted from the verdict forms. Defendant's underlying conviction upon which the prior strike conviction and prior prison term allegations were based was subsequently vacated and the charge dismissed, however. This issue is addressed in further detail in part VII., *post*, of the Discussion.

Defendant advances multiple claims on appeal. With respect to his conviction for attempted murder, he argues there is insufficient evidence supporting both the conviction and the jury's finding the crime was willful, deliberate and premeditated. He also argues the trial court erred in failing to instruct the jury sua sponte on imperfect self-defense or, alternatively, his trial attorney rendered ineffective assistance of counsel in failing to request the instruction.

With respect to the jury's finding the crimes were "committed for the benefit of, at the direction of, or in association with any criminal street gang" (§ 186.22, subd. (b)(1)), defendant argues that under the California Supreme Court's decision in *People v. Prunty* (2015) 62 Cal.4th 59, 81, 93 (*Prunty*), the prosecutor failed to prove the existence of a single criminal street gang and the gang enhancement is therefore unsupported by substantial evidence. He also argues the gang expert's reliance on inadmissible booking admissions and testimonial hearsay constituted prejudicial error under *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*) and *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). In addition, defendant argues the trial court erred in admitting prejudicial gang evidence under Evidence Code section 352, and his right to due process; and he asserts a claim of cumulative error.

With respect to his sentence, defendant argues the trial court erred in imposing a concurrent sentence on count 2 rather than staying the sentence pursuant to section 654. Further, his prior conviction by plea for violating section 186.22, subdivision (a), was vacated and the charge dismissed for insufficient evidence, thereby eliminating the prior felony conviction upon which the prior strike allegation and the prior prison term allegation were based. Finally, he argues there are errors in the abstract of judgment.

The People concede the dismissal of defendant's prior felony conviction entitles him to resentencing and they concede there are errors in the abstract of judgment requiring correction. They otherwise dispute his entitlement to relief on the grounds asserted in this appeal.

We reject defendant's claims that his conviction for willful, deliberate and premeditated attempted murder was not supported by substantial evidence, that the trial court committed reversible error in failing to instruct the jury sua sponte on imperfect self-defense, and that there was *Prunty* error as to the existence of a criminal street gang as defined under the statute. However, we find much of the gang expert's testimony is inadmissible under *Sanchez* and *Elizalde* and we conclude the error is prejudicial, requiring reversal of the gang enhancement.[3]

In addition, we reject defendant's claims that he is entitled to reversal of his remaining convictions on counts 1 and 2 under section 352 of the Evidence Code and/or due process principles, and we reject his claim that the trial court erred in failing to stay his sentence on count 2 pursuant to section 654. Finally, in addition to reversal of the gang enhancement, we agree with the parties that this matter must be remanded for resentencing given that defendant's prior felony conviction was vacated and the charge dismissed, and that there are errors in the abstract of judgment requiring correction.

FACTUAL SUMMARY

I. Prosecution's Case

A. Summary

On June 6, 2013, at approximately 4:00 p.m., defendant, Ashley Ramirez and Ramirez's two children were in her Dodge Charger traveling on a two-lane, one-way street in Hanford, heading to the parole office. Ramirez, who was defendant's girlfriend, was driving and he was in the passenger seat.[4] On the same road, Edgar Robledo was in the passenger seat of a Ford Expedition driven by his girlfriend, Ruby Arellano. Their

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[3] The evidence adduced at trial was sufficient to support the jury's finding on the gang enhancement allegations, however, and, therefore, retrial is not barred by the double jeopardy clause. (*Lockhart v. Nelson* (1988) 488 U.S. 33, 34; *People v. Story* (2009) 45 Cal.4th 1282, 1296–1297; *People v. Lara* (2017) 9 Cal.App.5th 296, 302, fn. 3 (*Lara*).)

[4] Defendant and Ramirez are now married.

infant daughter was in the vehicle with them, along with Robledo's teenage sister. An altercation occurred between defendant and Robledo, and defendant pulled a gun and fired three shots into the rear window of Arellano's vehicle. Ramirez then drove off down a cross street. No one in Arellano's vehicle was injured, and she drove home.

Responding to a call of shots fired, police shortly thereafter located Arellano's vehicle in the driveway. Police recovered three spent shell casings of the same caliber and shattered glass at the location of the shooting. Arellano's vehicle had two bullet holes in the back of the rear seat. One spent bullet was lodged in the seat and another was found on the floor of the car.

B. Eyewitness Testimony

At trial, Roger Beauton testified that he was a passenger in his friend's car and witnessed the shooting. He testified they were driving east on Third Street when a dark gray or dark blue Chrysler 300M, later identified as Ramirez's blue Dodge Charger, cut them off.[5] There was a Ford Expedition in front of the Charger with its windows down. Beauton heard three shots and saw the rear window of the Expedition shatter. He saw an arm and a dark colored gun sticking out the passenger window of the Charger; he did not see anything sticking out of the Expedition.

Beauton testified he did not see the occupants of the Charger because he was writing down the car's license plate number on a receipt. After the shots were fired, the Charger turned right on a cross street and the Expedition turned right on a subsequent cross street.

Arellano, who was driving the Expedition, testified that she did not remember anything and did not want to come to court. She said she was uncooperative with police

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[5] Beauton testified he knew cars and was certain it was a Chrysler 300M, but the license plate number he wrote down belonged to a blue Dodge Charger registered to Ashley Ramirez. Beauton also misidentified the other vehicle as a Ford Explorer, and his testimony regarding the time of the day the crime occurred also differed from other witnesses' testimony, including responding officers. Hereinafter, we refer to the vehicles as the Charger and the Expedition.

on the day of the crime because she was scared of retaliation. She described little during her testimony, but said she thought there were two people in the blue car. She said she heard shots, was scared and hurriedly drove to her home, which was nearby. She also testified that Robledo was not talking to anyone, she did not see anyone pointing a gun, and Robledo did not have a gun. She thought the Expedition's windows, which were tinted, were rolled up at the time of the shooting.

Arellano stated that Robledo was in the passenger seat, her infant daughter was in the middle of the back seat and Robledo's sister was sitting behind him. No one was hurt in the shooting and she did not call the police. She testified that no one had a cell phone and there was no house phone.

Robledo testified that he used to be a Sureño, or southerner, but was no longer "gang banging." Just prior to the shooting, he was with Arellano, their baby and his sister in the left lane when he told Arellano to pass the blue Charger that was in front of them. As Arellano was passing in the right lane, the passenger in the Charger started "trippin," and "throwing gang signs at [him]." Robledo put both his hands up and responded, "What's up?" The passenger, whom he described as "bald" and thought he recognized as "Mousey" from their days together at the California Youth Authority (CYA), hung out the window and fired three shots at him. Robledo testified the Expedition's windows were rolled up and he did not see if the passenger was saying anything because the Charger's windows were also rolled up.

Robledo testified that northerners and southerners have subsets, but subset association is not known unless someone says something specific or is wearing certain colors. He testified that defendant is a northerner from Corcoran, but he did not know if defendant belonged to any specific subset. He said he was positive the person who shot at him was defendant and, after first testifying he had not seen defendant between their

days together at CYA and the shooting, he said he saw defendant driving by his house a few days before the shooting in a small, older black car.[6]

On cross-examination, Robledo testified that about four and one-half to five years ago, he and defendant were in CYA together for about a year. He said he did not have any "beef[s]" with defendant and they never had any "one-on-one" fights, but he knew defendant was from Corcoran and it was everybody against everybody during fights. He also testified that when defendant drove by his house, defendant said something to him, but the Expedition was not parked at the house at the time and he had not previously encountered defendant while driving the Expedition.

At the time of the shooting, Robledo testified both vehicles were in the left lane and he did not see any other cars around. The Charger was ahead of the Expedition and it kept stopping. Robledo told Arellano to pass and "they … started throwing up gang signs." Robledo testified he said, "[W]hat's up?" because defendant was "saying stuff" and he "had to act a little hard." Robledo then wavered on the gang signs, testifying that he could not recall and was not sure. He testified he was shot at three times and they all ducked, and two or three more shots were fired after the Charger turned right on the cross street.

Ramirez also testified. She and defendant had only been dating a few weeks at the time of the shooting and they later married. She testified she and defendant were driving in Hanford, but she did not remember the Expedition, any argument, a gun being pulled or a shooting. She remembered talking to police later, but she had been drinking and her children were left unattended so she just agreed with police in an effort to get home to her kids. She testified she does not know Robledo, and she did not remember telling an

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6 The prosecution's gang expert testified Robledo stated defendant had passed by his house several times.

officer that someone in the other car pulled a gun or anything else she said in her statement to police.

An audio recording of Ramirez's statement to police, taken on June 9, 2013, was subsequently played for the jury. In the statement, Ramirez said that she and defendant saw Robledo and Arellano, and Robledo was driving. The windows were rolled up, but Robledo was saying something and defendant started cussing at him. Defendant stated, "[T]hat's that mother fucker," and Ramirez told him not to do anything stupid because her two- and three-year-old children were in the car. The Expedition, which had been behind them, pulled alongside them on the right and Robledo was "talking shit to [defendant]." Ramirez initially said he had something in his hand, but then clarified that she never saw anything in his hand. She said he saw her baby and she thought that maybe he saw the kids and "stopped." The car's windows were up and the child safety lock was on, but defendant said, "I'm gonna get that mother," and told her to unlock the windows. After she unlocked the windows, he rolled his window down and fired a gun at the other vehicle two or three times. Ramirez saw the rear window shatter. She proceeded on to Wal-Mart and took her kids shopping. When she returned to her car, defendant was gone.

C. Gang Expert's Testimony

Justin Vallin, a sergeant with the Hanford Police Department, was the lead investigator assigned to the shooting and the prosecution's gang expert at trial. Vallin responded to the victims' residence after the shooting and he was at that time a member of the gang task force.

Vallin testified that Varrio Perry Heights (VPH) and Corcoran North Side are Norteño cliques in Corcoran, and that Robledo had identified the shooter as Mousey from VPH Corcoran. Vallin was able to match the clique and moniker with defendant, and a few days after the shooting, Robledo positively identified defendant from a lineup of six photos. Vallin testified that defendant's and Robledo's mothers lived approximately

one-half mile apart, and the shooting occurred within the route from defendant's house to the parole office.

Regarding the Norteño gang, Vallin testified Norteños are more predominant in Kings County than Sureños. There are approximately 2,500 Norteños and there were several subsets or cliques, which currently get along with one another. Norteños associate themselves with the color red and the number 14, be it one and four, X-4 or XIV, because the letter N, for Norteño or Nuestra Familia, is the 14th letter of the alphabet. Vallin testified that Nuestra Familia is the "overall authority" for Norteños and the original prison gang for Norteños from the late 1960's. Other symbols are set-specific, but "a northern star" or a "five point star" is a symbol, as is the Huelga bird, or striking bird. To have a Huelga bird, members are required "to put in some type of work, [through an] act of violence or act to help assist the Nortenos."

Vallin testified there are approximately 10 subsets in Kings County and they are just variations of the Norteño gang and represent specific areas where members grew up.[7] They share the same common signs and symbols of the Norteños, including the color red and the number 14, and "are still under the umbrella of the Norteños." Vallin testified that individuals in Nuestra Familia, the original prison gang, are in prison for life and the gang receives money from the streets through what is called "paying taxes." Subsets pay taxes to the Norteños, and if they want to sell drugs or run guns for profit, they have to pay a tax back to Nuestra Familia of approximately $200 to $250 per member.

The primary activities of the Norteños include almost every crime, such as attempted murder, murder, drive-by shootings, grand theft, identity theft, credit card fraud, narcotics sales, weapons possession and sales, bribery, extortion and arson. Vallin testified that Norteño members are found throughout the criminal justice system,

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[7] Vallin did not testify that all Norteños claim a subset nor did his testimony provide further details regarding subsets.

including the juvenile division formerly called CYA; the Norteño gang is extremely aggressive; and their primary rival is the Sureño gang, although the Crips and Bull Dogs are also rivals.

Vallin testified about two predicate offenses, the first of which involved Salvador Lomeli, a Norteño who was convicted of assault with a deadly weapon following a 2012 stabbing attack by a group of Norteños on Marquis Jones, a Black man. The second involved Rogelio Cuevas, a Norteño who was convicted of mayhem following a 2012 Kings County Jail incident during which he and another Norteño slashed a third Norteño across the face because the victim had been associating with a Norteño dropout while out on the streets.

Based on contacts with law enforcement, which we address in further detail in part III. of the Discussion, Vallin opined that Lomeli, Cuevas and defendant are Norteño gang members. He also testified that defendant has four Norteño gang tattoos: one dot on his right hand and four dots on his left hand, signifying the number 14, and an X on his left calf and a 4 on his right calf, also signifying the number 14.

The prosecutor presented Vallin with the following hypothetical: "A Norteno, an active member, if he is driving down the road [and] recognizes a Sureno that he's had [a] beef with on prior occasion[s] and shoots into that car in the direction of that Sureno, do you have an opinion as to whether that would be in benefit of the Nortenos?" Vallin opined that the shooting would be for the benefit of the Norteños by showing the shooter was "down for his gang" and willing to commit crime in broad daylight on a busy street, without regard for witnesses, pedestrians or other vehicles. The shooting would also enhance the individual's reputation by demonstrating he presents a threat.

Vallin further testified that members could climb the hierarchy within the Norteño structure both through the amount of taxes collected and by committing crimes for the gang, which demonstrates the member's level of involvement and willingness to benefit the gang. On the Norteños agenda is killing Sureños and shooting at a Sureño with the

intent to kill would assist with climbing the hierarchy. Vallin also testified that a Norteño who encountered a rival gang member with whom he had "past altercations with" would be "expected to take action on sight." The failure to do so would be perceived as weakness and members want to show brutality. Vallin testified Norteños seek to instill fear in the community, and as the gang spreads and takes over a neighborhood, citizens uninvolved with the gang become afraid to speak with police or testify in court out of fear of retaliation by the gang.

II. Defense Case

A. Angela Almeida Gutierrez's Testimony

Gutierrez testified that she was driving home with her children and was in the right lane on Third Avenue when she saw a small, dark car behind her in the right lane and a sport utility vehicle (SUV) beside that car in the left lane. As she was slowing and turning right into her driveway, she saw "hands [coming] from the SUV" and heard three gunshots. She did not see anything extending from the car. In response to questions regarding her vantage point, Gutierrez testified she was looking out her window to the left as the SUV was passing by and she saw a man pointing a gun from the right side of the vehicle.

B. Defendant's Testimony

Defendant testified that in 2004, when he was 14 years old, he was involved in a gang related fistfight between northerners and southerners in front of a middle school. There were six or seven people involved, including his cousin, Paul Marin, and there was a child under the age of eight present who was reportedly hurt. Defendant was found guilty of felony child endangerment, to which was attached a gang enhancement, and he was committed to CYA. (§§ 273a, subd. (b), 186.22, subd. (d).)

While in CYA, defendant engaged in several fights. Defendant explained that during one particular incident, he ran toward another Norteño with the intent to fight, but the other boy ran away. Defendant's foot hit the door and smashed the boy's hand. On

cross-examination, defendant described the incident as a misunderstanding and explained the boy was trying to shut the door and defendant ran into it, smashing the boy's hand and breaking it. Defendant was convicted of assault with force likely to produce great bodily injury and a substantive gang offense.[8] (§§ 245, subd. (a)(1), 186.22, subd. (a).)

Defendant testified that not all of the fights he was in were against Sureños, however, and he did not get into any fights while he was in prison. He also testified that his tattoos were several years old.

Defendant testified that on the day of the shooting, he was on his way to the parole office with Ramirez and her two children. Although he acknowledged he was not supposed to have a gun, he bought one the day before and had it with him in the car. Defendant denied knowing Robledo, remembering him from CYA or having any beefs with him; and he testified he did not recall passing Robledo's house or knowing prior to the shooting that Robledo lived there.

Defendant also denied the shooting was planned. He testified that Arellano's SUV was entering the street from a store at the intersection. Robledo was in the passenger seat and the SUV was facing the Charger as the car passed by and stopped at a light. While at the light, there was one car between the Charger and the SUV. Defendant testified Robledo threw up his hands and said something, but defendant could not hear what it was because the vehicles' windows were rolled up and the SUV had tinted windows.

Defendant testified the SUV pulled up along the right side of the Charger, and Robledo threw his hands up, called them "bitches" and said, "fuck our family … and our kids." Defendant testified he lost his son in 2009 when his former girlfriend suffered a miscarriage and Robledo's words "kind of got [him] mad." He responded by flipping Robledo off and telling him, "Fuck you." He testified he saw Robledo pull a gun, and he

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8 This gang conviction, incurred on August 22, 2011, is the felony conviction upon which the prior strike and prior prison term allegations were based.

pulled his gun and fired three shots toward the SUV in defense of himself and his family. Robledo did not fire and Ramirez then turned right. Defendant denied he told Ramirez to unlock the windows, but he testified he rolled down his window and he admitted she told him not to do anything stupid. He said he was not expecting to hit anyone when he fired; he just wanted the SUV to leave.

Ramirez proceeded to Wal-Mart, where she and her children went shopping. Defendant then got out of the Charger, went back to his house to get his car and threw the gun away.

Defendant gave a brief, recorded statement to police after he was taken into custody, and it was played for the jury. Defendant said Ramirez was a friend, he did not know what kind of car she drove and he would be surprised if police told him it was a blue Dodge Charger. He also said he drove his black Nissan to the parole office on June 6, 2013, and he declined to say whether anyone was with him.

On surrebuttal, defendant testified he had been drinking prior to being taken into custody and he did not want to talk about Ramirez outside of court because in the past, police disbelieved what he told them. He also did not want to involve her in the situation. He testified that contrary to his statement to police, at the time of the shooting he was dating Ramirez and he knew she drove a blue Dodge Charger.

DISCUSSION

I. Sufficiency of the Evidence Supporting Attempted Murder Conviction

Defendant challenges his conviction for attempted murder and the jury's finding the attempted murder was willful, deliberate and premediated on sufficiency of the evidence grounds. For the reasons that follow, we find the jury's determinations well supported by substantial evidence.

A. Standard of Review

On appeal, the relevant inquiry governing a challenge to the sufficiency of the evidence "'is whether, after viewing the evidence in the light most favorable to the

prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055, cert. den. (2016) [136 S.Ct. 1714].) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*Ibid.*) "'[I]t is the jury, not the appellate court which must be convinced of the defendant's guilt ….'" (*People v. Nguyen, supra*, at pp. 1055–1056.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio, supra,* at p. 357.)

B. Elements

Attempted murder requires specific intent to kill, or express malice, "'and the commission of a direct but ineffectual act toward the accomplishing the intended killing.'" (*People v. Smith* (2005) 37 Cal.4th 733, 739, 751.) Express malice is shown when the defendant "'either desires the victim's death, or knows to a substantial certainty that the victim's death will occur.'" (*People v. Houston* (2012) 54 Cal.4th 1186, 1217.) "[E]vidence of motive is often probative of intent to kill," but it "is not required to establish intent to kill." (*People v. Smith, supra,* at p. 741.) Intent "may in many cases be inferred from the defendant's acts and the circumstances of the crime." (*Ibid.*)

Unlike murder, "attempted murder is not divided into degrees, but the sentence can be enhanced if the attempt to kill was committed with premeditation and deliberation." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 654.) More than a specific intent to kill is required to support a finding of deliberation and premeditation. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) "'Deliberation' refers to careful weighing of

considerations in forming a course of action; 'premeditation' means thought over in advance." (*Ibid.*) "'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of the time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.…" [Citations.]'" (*Ibid.*)

"In *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [(*Anderson*)], [the Supreme Court] reviewed earlier decisions and developed guidelines to aid reviewing courts in assessing the sufficiency of the evidence to sustain findings of premeditation and deliberation. [Citation.] [The court] described three categories of evidence recurring in those cases: planning, motive, and manner of killing." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419–420.) "[H]owever, '[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate.'" (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1081; accord, *People v. Casares* (2016) 62 Cal.4th 808, 824.) The "guidelines are descriptive and neither normative nor exhaustive, and … reviewing courts need not accord them any particular weight." (*People v. Halvorsen*, *supra*, at p. 420; accord, *People v. Casares*, *supra*, at p. 824.).)

C. Analysis

Defendant contends the evidence was insufficient to prove beyond a reasonable doubt that he intended to kill Robledo and while there is authority for the proposition that intent can be inferred from a potentially fatal, close range shooting, this case is distinguishable because Robledo started the argument and drew a gun, causing defendant to react in self-defense. Defendant also contends that the prosecutor's arguments pointed to implied malice, which is not a basis for attempted murder. Regarding the special allegation of willfulness, deliberation and premeditation, defendant again points out that he did not start the argument and was reacting to Robledo's actions. In addition, he contends the prosecutor, in argument, incorrectly relied on events that occurred well before the chance meeting between defendant and Robledo that afternoon.

We are unpersuaded given the evidence in this case. The victim testified that he and defendant knew one another from CYA and although there were no specific instances of hard feelings between them, they were associated with rival gangs and those gangs fought with one another in CYA. The victim also positively identified defendant as the shooter and provided his gang moniker. As well, there was evidence defendant knew where the victim lived, drove by slowly prior to the shooting and said something as he did so. Thus, while the encounter between defendant and Robledo at the time of the shooting was apparently one of chance, there was evidence from which the jury could conclude that defendant knew who Robledo was and knew he was a rival gang member.

Regarding specific intent to kill, Ramirez told police that when they saw Robledo's vehicle, defendant got mad and "started cussing at him." Defendant said, "[T]hat's that mother fucker." She asked what he was talking about and told him not to do anything stupid with her kids in the car. Ramirez said when the SUV pulled alongside her car, Robledo was saying things to defendant, but her window locks were enabled and he could not roll down his window. Defendant said, "I'm gonna get that mother." Ramirez tried to calm him down because her kids were in the car, but he said something to the effect of, "Just put the fuckin window down." Ramirez told him not to do anything stupid and when she saw he had a gun, she said, "[W]hat the fuck are you doing with that?" Defendant then shot at the SUV. This evidence is clearly sufficient to support the jury's finding that defendant intended to kill Robledo. It is likewise sufficient to support the finding that the shooting was willful, deliberate and premeditated.

The *Anderson* factors "'are not a sine qua non … nor are they exclusive'" but, in this case, evidence of all three is present. (*People v. Koontz, supra*, 27 Cal.4th at p. 1081.) Evidence of motive was present in that defendant and Robledo had a shared history from CYA and were rival gang members who exchanged words and/or gestures from their respective passenger seats. In terms of planning, defendant was upset at seeing Robledo, explicitly stated he was going to get Robledo and demanded his girlfriend

unlock the windows. He then pulled out a gun and after unrolling the window, fired three shots into the rear window vehicle Robledo was riding in. Finally, defendant utilized a lethal weapon that is effective even if employed from a distance, and he fired three shots.

The decisions in *People v. Ratliff* (1986) 41 Cal.3d 675, 695 (*Ratliff*) and *People v. Patterson* (1989) 209 Cal.App.3d 610, 615 (*Patterson*), cited by defendant, are inapposite. In *Ratliff*, the defendant was convicted in relevant part of first degree murder and attempted murder, but the jury was not instructed that attempted murder required specific intent to kill or that the implied malice instruction did not apply to the attempted murder count. (*Ratliff*, *supra*, at pp. 683, 695.) In *Patterson*, the defendant was convicted of attempted murder and the trial court failed to instruct the jury that the defendant must have the specific intent to kill, instead relying on a theory of felony-murder or implied malice. (*Patterson*, *supra*, at pp. 612, 615.) In contrast, the jury in this case was properly instructed that it had to find defendant acted with the intent to kill, nor was it instructed in error on implied malice.

Additionally, while we agree with defendant that speculative evidence does not suffice to support factual inferences (*People v. Franklin* (2016) 248 Cal.App.4th 938, 951; accord, *People v. Marshall* (1997) 15 Cal.4th 1, 35), here there was evidence proffered at trial as to defendant's words and actions immediately preceding the shooting, and that evidence clearly suffices to support the jury's determination that he specifically intended to kill the victim and that he did so willfully, deliberately and with premeditation.[9] Although defendant testified that he shot at Robledo's vehicle in

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9 We recognize that while not advancing an instructional error or a prosecutorial error claim on these grounds, defendant nevertheless attempts to strengthen his insufficiency of the evidence claim by pointing out that the trial court failed to define express malice and asserting that the prosecutor implied a conscious disregard for life is sufficient to support an attempted murder conviction. We are not persuaded. As we have explained, this is not a case where the court failed to instruct the jury on specific intent to kill or where the jury was misinstructed or mislead that implied malice sufficed. (E.g., *People v. Lee* (1987) 43 Cal.3d 666, 669; *People v. Beck* (2005) 126 Cal.App.4th 518, 524–525.) Nor is it a case where the evidence the jury

self-defense after Robledo pulled a gun on him and with the intention of getting Robledo to leave, the jury was entitled to reject his version of events in whole or in part. (See *People v. Bolin* (1998) 18 Cal.4th 297, 331 ["Reversal … is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'"]; accord, *People v. Manibusan* (2013) 58 Cal.4th 40, 87; *People v. Lipsett* (2014) 223 Cal.App.4th 1060, 1063.) Accordingly, we reject defendant's insufficiency of the evidence claim as to his attempted murder conviction.

II. Failure to Instruct Sua Sponte on Imperfect Self-defense

The trial court instructed the jury on the lesser included offense of voluntary manslaughter under the theory of sudden quarrel or heat of passion. It also instructed the jury on perfect self-defense but did not instruct on an imperfect self-defense theory of manslaughter. Although defendant did not request an instruction on imperfect self-defense, he claims the trial court committed reversible error in failing to give the instruction sua sponte, the error must be evaluated under the federal constitutional standard of review, and the error was prejudicial under both the federal and the state standards of review.[10]

In response, the People contend there was not substantial evidence defendant had an actual belief he was in imminent danger of great bodily injury or death. Alternatively, they contend defendant's testimony supported only the perfect self-defense instruction that was given.

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necessarily relied on to infer defendant had the specific intent to kill amounted to nothing more than mere speculation.

10 Because we find any error in failing to instruct the jury on imperfect self-defense was harmless, we do not reach defendant's alternate argument that trial counsel was ineffective in failing to request the instruction.

A. Voluntary Manslaughter

"[V]oluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder." (*People v. Barton* (1995) 12 Cal.4th 186, 200–201.) "An instance of imperfect self-defense occurs when a defendant acts in the actual but unreasonable belief that he or she is in imminent danger of great bodily injury or death. [Citation.] Imperfect self-defense differs from complete self-defense, which requires not only an honest but also a reasonable belief of the need to defend oneself." (*People v. Simon* (2016) 1 Cal.5th 98, 132 (*Simon*).)

"A trial court has a sua sponte duty to instruct the jury on a lesser included uncharged offense if there is substantial evidence that would absolve the defendant from guilt of the greater, but not the lesser, offense. [Citation.] Substantial evidence is evidence from which a jury could conclude beyond a reasonable doubt that the lesser offense was committed. [Citations.] Speculative, minimal, or insubstantial evidence is insufficient to require an instruction on a lesser included offense." (*Simon, supra*, 1 Cal.5th at p. 132.) In contrast with defenses, "[a] trial court's sua sponte duty to instruct on lesser included offenses arises … not from the arguments of counsel but from the evidence at trial. 'The jury should not be constrained by the fact that the prosecution and defense have chosen to focus on certain theories.'" (*People v. Barton*, *supra*, 12 Cal.4th at p. 203; accord, *People v. Breverman* (1998) 19 Cal.4th 142, 157 (*Breverman*).)

We review defendant's claim of instructional error de novo. (*Simon, supra*, 1 Cal.5th at p. 133; *People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

B. Error

We may not evaluate the credibility of the witnesses' testimony (*Breverman, supra*, 19 Cal.4th at p. 162), and "[e]ven if it does not inspire confidence, a defendant's testimony constitutes substantial evidence" (*People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1446). In this case, defendant denied knowing Robledo or planning to

shoot him. He testified that Robledo called him and his family names, which angered him given the loss of his son, and that Robledo pulled a gun on him after he flipped Robledo off and said, "Fuck you." Fearing for his and his family's safety, defendant then pulled his gun and fired three shots. Moreover, Gutierrez also testified she saw a man in the SUV pointing a gun. This testimony constitutes substantial evidence supporting the perfect self-defense instruction given and we cannot dismiss it, as do the People, as "self-serving."

Defendant acknowledges our decision in *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1273, 1275 (*Rodriguez*), in which we determined that the evidence adduced at trial did not require an instruction on imperfect self-defense and rejected any suggestion in *People v. Ceja* (1994) 26 Cal.App.4th 78, overruled on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 92–94, or *People v. De Leon* (1992) 10 Cal.App.4th 815 "that imperfect self-defense must be given whenever perfect self-defense instructions are warranted by the evidence" (*Rodriguez, supra*, at p. 1273). Defendant contends generally, however, that *Rodriguez* is distinguishable because here there is evidence supporting instructions on both perfect and imperfect self-defense.

In *Rodriguez*, we recognized that "'where there is an issue as to the "reasonableness" of the asserted belief' in self-defense, the [imperfect self-defense] instruction should be given." (*Rodriguez, supra*, 53 Cal.App.4th at p. 1270.) We found no such issue in that case, however, and we noted the defendant's failure to point to any evidence supporting a theory based on an actual but unreasonable belief. (*Id.* at p. 1272.) We concluded that the defendant either stabbed the victim to death justifiably in self-defense, as he claimed, or he did not; there was no substantial evidence that he killed the victim based on an actual but mistaken belief in the need to defend himself. (*Id.* at pp. 1275–1276.)

The facts adduced in this case regarding self-defense are relatively few and straightforward. Defendant testified that the SUV pulled up next to the car he was in, he

and Robledo exchanged words, and Robledo pulled a gun on him as the SUV sped up and passed the car, which caused him to fear for his life and that of his family. Gutierrez also testified she saw a man in the SUV pointing a gun toward the car. Defendant does not detail the basis for his argument that in addition to an actual, reasonable belief he and his family were in imminent danger of great bodily injury or death, these facts constitute substantial evidence of an actual but unreasonable belief. We recognize, however, that defendant testified Robledo did not fire his gun and there is no dispute defendant fired three shots into the rear window of the SUV. We need not decide whether the trial court erred, however, because to the extent the evidence adduced at trial was arguably sufficient to require an imperfect self-defense instruction even in the absence of a request for one, we find any error harmless.

C. Prejudice

1. Applicable Standard of Review

State law errors are reviewed under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 837 (*Watson*), which requires a determination "whether there is a 'reasonable probability' that a result more favorable to the defendant would have occurred absent the error." (*People v. Aranda* (2012) 55 Cal.4th 342, 354 (*Aranda*).) Federal constitutional errors are reviewed under the standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), which requires courts find "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Aranda*, *supra*, at p. 367.)

Relying on the Court of Appeal's decision in *People v. Thomas* (2013) 218 Cal.App.4th 630, 633, 644 (*Thomas*), defendant urges that we must evaluate the instructional error in this case under the *Chapman* standard. The People respond that in *Breverman*, *supra*, 19 Cal.4th 142 and *People v. Moye* (2009) 47 Cal.4th 537 (*Moye*), the California Supreme Court applied the *Watson* standard of review in evaluating the failure to instruct the jury on voluntary manslaughter.

In *Thomas*, the trial court instructed the jury on perfect and imperfect self-defense, but refused the defendant's request for an instruction on a heat of passion theory. (*Thomas*, *supra*, 218 Cal.App.4th at pp. 644–645.) The jury subsequently convicted the defendant of second degree murder. (*Id.* at pp. 633, 646.) After observing first that *Breverman* involved a failure to instruct the jury sua sponte rather than a refusal to give a requested instruction, the Court of Appeal concluded that the "[f]ailure to instruct the jury on heat of passion to negate malice is federal constitutional error requiring analysis for prejudice under *Chapman*." (*Thomas*, *supra*, at p. 644.) In reaching this conclusion, the court reasoned that "[h]eat of passion manslaughter is a lesser included offense of murder, facts permitting, *because it negates the element of malice*. [Citation.] If provocation is properly presented in a murder case, then, proving the element of malice requires the People to prove the absence of provocation beyond a reasonable doubt[,] [citation] [and] '… instructions relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violate the defendant's due process rights under the federal Constitution.'" (*Ibid.*, citing *People v. Rios* (2000) 23 Cal.4th 450, 454, 461–462 & *People v. Flood* (1998) 18 Cal.4th 470, 491.)

As the People point out, the California Supreme Court has held "that federal law has no effect on the appropriate standard of California appellate review when, in a noncapital case, the defendant challenges his otherwise valid conviction of a charged offense on grounds the trial court failed *in its sua sponte duty* under California law to provide instructions, correct and complete, on all lesser included offenses, including all theories thereof, which enjoyed substantial support in the evidence." (*Breverman*, *supra*, 19 Cal.4th at pp. 172–173; accord, *Moye*, *supra*, 47 Cal.4th at p. 556; *People v. Randle* (2005) 35 Cal.4th 987, 1003, overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) We recognize that in *Breverman* and *Moye*, Justice Kennard dissented with respect to the applicable standard of review and argued that the federal constitutional standard of review applied. (*Moye*, *supra*, at pp. 563–565; *Breverman*,

supra, at pp. 189–191.) In response, in both *Moye* and *Breverman*, the majority stated that the defendant had not raised that claim on appeal (*Moye*, *supra*, at pp. 557–558, fn. 5; *Breverman*, *supra*, at p. 170, fn. 19), a point Justice Kennard did not find dispositive in *Moye* and with which she disagreed in *Breverman* (*Moye*, *supra*, at pp. 557–558, fn. 5; *Breverman*, *supra*, at pp. 191–194; see *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1143–1146 (*Millbrook*) [discussing unresolved standard of review]).

We also recognize that the Court of Appeal's decision in *Thomas* followed an order by the California Supreme Court granting review and transferring the case back to the appellate court to consider the issue of federal constitutional error in the context of the trial court's refusal to instruct as requested on heat of passion voluntary manslaughter. (*Thomas*, *supra*, 218 Cal.App.4th at p. 633; see *Millbrook*, *supra*, 222 Cal.App.4th at pp. 1145–1146 [addressing procedural history in *Thomas*].) While we remain bound to follow the decisions of our Supreme Court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and, at this time, *Breverman* appears to control the issue of the trial court's failure to instruct sua sponte on a manslaughter theory, we conclude that any error is harmless even under the more stringent *Chapman* standard of review, and we will therefore assume its application here (*People v. Peau* (2015) 236 Cal.App.4th 823, 830 (*Peau*)).

2. Application of *Chapman*

Under *Chapman*, a federal constitutional error is harmless when the reviewing court determines "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' [Citation.] When there is '"a reasonable possibility"' that the error might have contributed to the verdict, reversal is required." (*Aranda*, *supra*, 55 Cal.4th at p. 367; accord, *People v. Gonzalez*, *supra*, 54 Cal.4th at p. 666.)

In this case, the jury found that the attempted murder of Robledo was willful, deliberate and premediated. "[I]n some circumstances it is possible to determine that

although an instruction on a lesser included offense was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only the lesser offense was committed has been rejected by the jury." (*People v. Sedeno* (1974) 10 Cal.3d 703, 721 (*Sedeno*), overruled on other grounds in *Breverman*, *supra*, 19 Cal.4th at p. 163, fn. 10; accord, *People v. Wright* (2006) 40 Cal.4th 81, 98.) Aware of this rule, defendant contends that in *People v. Berry* (1976) 18 Cal.3d 509, 518 (*Berry*), the California Supreme Court rejected application of the *Sedeno* rule to a first degree murder conviction where the trial court failed to instruct the jury on voluntary manslaughter. Defendant also cites to the Court of Appeal's decision in *People v. Ramirez* (2010) 189 Cal.App.4th 1483 (*Ramirez*), in which the court, without elaboration and in reliance on *Berry*, rejected the People's argument that in finding the defendant "acted willfully, deliberately, and with premeditation, [the jury] necessarily found he did not act under the heat of passion." (*Ramirez*, *supra*, at p. 1488, fn. omitted.)

In *People v. Wharton* (1991) 53 Cal.3d 522 (*Wharton*), however, a decision which was issued years after *Berry*, the California Supreme Court determined that "[b]y finding [the] defendant was guilty of first degree murder, the jury necessarily found [the] defendant premeditated and deliberated the killing. This state of mind, involving planning and deliberate action, is manifestly inconsistent with having acted under the heat of passion …." (*Wharton*, *supra*, at p. 572.) The existence of some tension between the *Wharton* and *Berry* holdings was recently acknowledged by the Court of Appeal in

Peau, *supra*, 236 Cal.App.4th at page 831, but the court concluded the two holdings could be reconciled and it followed the more recently decided *Wharton*.[11]

In *Peau*, the court also disagreed with the Court of Appeal in *Ramirez* and explained, "The jury here was instructed that it could not return a verdict of first degree murder unless it found that Peau 'carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill.' We agree that such a finding 'is manifestly inconsistent with having acted under the heat of passion.' [Citation.] Although *Berry* refused to find an error in omitting a heat-of-passion instruction harmless, it did not even mention that first degree murder must be willful, deliberate, and premeditated. Instead, it focused only on the fact that the instruction distinguishing between first and second degree murder in that case 'made passing reference to heat of passion and provocation for the purpose of distinguishing between' the two types of murder. [Citation.] We think this strongly suggests that the sole issue considered in *Berry* was whether the error was harmless because the jury received some instruction on the concepts of heat of passion and provocation, not whether the error was harmless because the jury found the murder was willful, deliberate, and premeditated and such a finding was inconsistent with a finding that the defendant acted in a heat of passion." (*Peau*, *supra*, 236 Cal.App.4th at pp. 831–832.)

In this case, the jury was instructed as follows on the special allegation of willful, deliberate and premeditated attempted murder: "The defendant acted willfully if he intended to kill when he acted. The defendant deliberated if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant premeditated if he decided to kill before acting.

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11 Neither party cited to *Wharton*, and the People did not address defendant's citation to *Berry* or *Ramirez*.

"The length of time the person spends considering whether to kill does not alone determine whether the attempted killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill is made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time." (See CALCRIM No. 601.)

We concur with the Court of Appeal in *Peau* that *Berry* does not foreclose our decision in this case. (*Peau, supra,* 236 Cal.App.4th at pp. 831–832.) The California Supreme Court has explained that in evaluating premeditation and deliberation, "'[t]he true test is not the duration of time as much as it is the extent of the reflection.' [Citations.] We have observed that '[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly ….' [Citation.] [A] killing resulting from preexisting reflection, of any duration, is readily distinguishable from a killing based on unconsidered or rash impulse." (*People v. Solomon* (2010) 49 Cal.4th 792, 813.) Thus, in finding true the special allegation that the attempted murder of Robledo was willful, deliberate and premediated, the jury necessarily found that defendant carefully weighed his decision to kill Robledo and made that decision prior to pulling his gun and firing three times into the rear window of Robledo's car. This finding is "manifestly inconsistent with having acted" out of a need to use self-defense attributable to an actual but unreasonable belief there existed imminent danger of great bodily injury or death posed by Robledo. (*Wharton, supra*, 53 Cal.3d at p. 572; see *Peau, supra,* at pp. 831–832; see *Millbrook, supra,* 222 Cal.App.4th at p. 1138 [jury's verdict not inconsistent with need for heat of passion instruction, where jury did not find the attempted murder was willful, deliberate and premeditated]; cf. *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1180 [refusal to instruct on imperfect self-defense not harmless

where jury deliberated three days on uncomplicated, one-count case and it acquitted the defendant of first degree murder, indicating its rejection of a willful, deliberate and premeditated plan to kill].)[12] Accordingly, we find any error in failing to instruct the jury on imperfect self-defense was harmless beyond a reasonable doubt.

III. Challenges to Gang Enhancement Finding

A. Background

"In 1988, the Legislature enacted the California Street Terrorism Enforcement and Prevention Act (the STEP Act). (§ 186.20 et seq.) 'The impetus behind the STEP Act ... was the Legislature's recognition that "California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to the public order and safety and are not constitutionally protected." (§ 186.21.)' [Citation.]

"As relevant here, the STEP Act prescribes increased punishment for a felony if it was related to a criminal street gang. (§ 186.22, subd. (b)(1).) '[T]o subject a defendant to the penal consequences of the STEP Act, the prosecution must prove that the crime for which the defendant was convicted had been "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1) ….) In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing,

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[12] In our case, the jury had no questions during deliberation and it returned its verdict after deliberating for just over one hour. (*People v. Vasquez, supra,* 136 Cal.App.4th at p. 1180.)

attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period. (§ 186.22, subds. (e) and (f).)'" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047, fn. omitted; accord, *Sanchez, supra*, 63 Cal.4th at p. 698; see *Prunty, supra*, 62 Cal.4th at pp. 67–68.)

Under the STEP Act, a gang enhancement may be attached to a crime "'only if the crime is "gang related."'" (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) However, it is not a crime to be a gang member (*Elizalde*, *supra*, 61 Cal.4th at p. 539; *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130), and "[n]ot every crime committed by gang members is related to a gang." (*People v. Albillar*, *supra*, at p. 60.) While gang membership is not an element of the enhancement, gang evidence can nevertheless bolster the prosecution's theory on the elements it is required to prove. (*Sanchez*, *supra*, 63 Cal.4th at pp. 698–699; *People v. Gutierrez* (2009) 45 Cal.4th 789, 820; *People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1044–1049; *People v. Villa-Gomez* (2017) 9 Cal.App.5th 527, 541 (*Villa-Gomez*).) That is, "[g]ang membership is simply circumstantial evidence establishing that the crime was gang related and a motive for why a defendant may have harbored the 'specific intent to promote, further, or assist in any criminal conduct by gang members.'" (*Villa-Gomez*, *supra*, at p. 540.)

B. Sufficiency of the Evidence as to Criminal Street Gang Element

Defendant first argues that the evidentiary deficiencies in this case mirror those in *Prunty* and the gang enhancement must be reversed as unsupported by substantial evidence. He contends that there was evidence that he was in the VPH subset while the conduct underlying the two predicate offenses involved two other subsets: Varrio Home Gardens and South Side Locs. Defendant maintains the prosecutor failed to show VPH is a criminal street gang within the meaning of the statute and also failed to demonstrate a link between the three subsets sufficient to show they were part of the same criminal street gang. (*Prunty*, *supra*, 62 Cal.4th at p. 82.)

The People respond that the evidence of self-admissions and taxation is sufficient to demonstrate the requisite links and establish the existence of the larger Norteño gang.

Here, the criminal street gang the prosecutor sought to prove defendant acted for the benefit of was the Norteño street gang, contrary to defendant's argument. The prosecutor relied on two predicate offenses, an assault with a deadly weapon committed in 2012 by Salvador Lomeli and four other gang associates and mayhem committed in 2012 by Rogelio Cuevas and another gang associate, both of which led to convictions. For each predicate offense, Vallin testified to a number of contacts between law enforcement and Lomeli and Cuevas. We must determine whether *Prunty* applies here and, if so, whether the prosecutor adduced sufficient evidence of a connection to support her theory that defendant attempted to murder Robledo for the benefit of the Norteño gang.

1. Gang Expert's Testimony

a. General Information

Vallin testified that in Kings County, there are approximately 10 different Norteño subsets and, unlike other areas in the state, they currently all get along. Vallin described Kings County as "a melting pot [of] several different types of gangs[; a] threat by numbers." He described the Norteño gang as the umbrella gang under which there exists subsets or cliques based on location, such as neighborhoods. Vallin stated he was aware of two Norteños subsets in Corcoran: VPH and Corcoran North Side, and he identified South Side Locs, Varrio Home Gardens and North Side Gangsters as subsets in Hanford.

Vallin also testified that the subsets answer to Nuestra Familia through payment of taxes between $200 and $250 per member. He explained, "If you want to be a Norteno and you want to [sell] narcotics or run guns and make money for the Nortenos you have to pay a tax." "If you wanted to sell narcotics in Kings County to make a profit for yourself, you would have to pay a tax back to the Nuestra Familia[,] which funnel[s] back through the prison systems."

Regarding custodial-setting fights, Vallin testified that fights occur between Norteños and Sureños, and the expectation that Norteños will attack Sureños on sight depends on orders handed down by the Nuestra Familia or by the Norteño gang members in charge of the specific counties. Sometimes there are orders to attack on sight, but, at other times, members are supposed to be "lower key" about it and attack when it will not be detected by law enforcement.

b. Evidence of Defendant's Gang Membership

Vallin opined that defendant is a Norteño gang member. In support of this opinion, Vallin relied on the following 10 contacts between defendant and law enforcement, in addition to defendant's gang tattoos.

On August 26, 2003, an officer contacted defendant in Corcoran after receiving a report defendant challenged someone to a fight by calling him a "scrapa."[13] Defendant was wearing a red shirt and a red cloth belt with an "N" belt buckle, the belt being "a common way Nortenos fly [their] colors." On August 27, 2003, another officer contacted defendant in Corcoran as he was leaving the area of a possible gang fight. He was with several people, including Henry Garcia, a known Norteño. Defendant stated he "kicks it with Norteno gang members and has for over a year." He was arrested for assault with a deadly weapon. Vallin also testified that Garcia was currently incarcerated for selling narcotics on behalf of the Norteños.

On July 9, 2004, during "a consensual contact" with an officer, defendant was in the company of Paul Marin, a known Norteño gang member presently incarcerated for arson with a gang allegation. Defendant stated he was a Norteño gang member and he was arrested for battery with a gang enhancement. During booking into juvenile detention, defendant stated he was a VPH Norteño and "was walked into the gang."

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13 "Scrapa" is a derogatory term used against Sureños by Norteños.

On March 9, 2006, during the booking process, defendant was documented for classification purposes as a Norteño associate.

On October 18, 2007, defendant was ordered to register as a gang member pursuant to section 186.30 and he registered as a VPH Norteño.

On November 28, 2007, defendant admitted he was a VPH Norteño and his moniker is Mousey during booking admission. He also had the dot tattoos on his hands.

On August 22, 2011, defendant pled guilty to assault with a deadly weapon likely to produce great bodily injury (§ 245) and a substantive gang offense (§ 186.22, subd. (a)).

On May 14, 2013, defendant was contacted by an officer who documented his gang tattoos. Defendant said he was a northerner, but inactive, and, when in jail, he is housed with northerners.

Finally, on June 9, 2013, during the booking process in response to questioning, defendant said he had been a Norteño both while incarcerated and while on the streets.

c. Evidence Relating to First Predicate Offense

Regarding the first predicate offense, Vallin testified that on Halloween night 2012, a group of four Norteños stabbed Marquis Jones while yelling, "Nortenos." One of those men, Lomeli, was subsequently convicted of assault with a deadly weapon. (§ 186.22, subd. (e)(1).) In support of his opinion that Lomeli was a Norteño at the time of the crime and stabbed Jones for the benefit of Norteños and in association with other Norteños, Vallin described eight contacts between Lomeli and law enforcement, as follows.

While at school on February 8, 2011, Lomeli was wearing red and had written Norte on his notebook.

On April 13, 2011, Lomeli had red shoelaces on, and he told an officer he had been a Norteño gang member for one year and was jumped in.

On May 4, 2011, Lomeli admitted he was a member of Varrio Home Gardens and had an "HFD" tattoo on his bicep, which stood for Hanford.

On May 25, 2011, Vallin had contact with Lomeli, who was wearing red ("flying his colors"), had HFD written on his hand, was with another Norteño gang member at a park and identified himself as the cousin of two men Vallin knew to be Norteños.

On June 23, 2011, Lomeli, who was wearing red, told an officer he had been a Norteño associate for a few months and he hung out at Lacey Park, which is predominantly frequented by Norteño gang members.

On September 2, 2012, Lomeli was ordered by the court to register as a gang member (§ 186.30).

On November 16, 2012, Lomeli admitted during the juvenile center booking process to being an associate of the Varrio Home Garden Norteños.

Finally, on November 16, 2012, Lomeli admitted during the juvenile center classification process that he was a Norteño.[14]

d. Evidence Relating to Second Predicate Offense

Regarding the second predicate offense, Vallin testified that on November 2, 2012, two Norteños slashed another Norteño across the face while in jail. The victim reported he had been stabbed because the Norteños discovered that while out on the streets, he had been hanging out with a Norteño gang dropout, who are viewed as "scum of the earth" for disrespecting the gang. One of two men, Cuevas, was subsequently convicted of mayhem. (§ 186.22, subd. (e)(16).) In support of his opinion that Cuevas was a Norteño at the time of the crime, Vallin described eight contacts between Cuevas and law enforcement, as follows.

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[14] There is some lack of clarity regarding whether the seventh contact occurred on September 2, 2012, or November 16, 2012, but Vallin's testimony suggests Lomeli made two admissions on one day, one during booking and another during classification.

On October 13, 2010, Cuevas was arrested for a probation violation and during a search, the officer found a marker pen and schoolwork on which the number three was crossed out and the letter N was emphasized in marker pen.[15] When he was booked that day, Cuevas admitted he was a Norteño associate.

On November 2, 2010, during his juvenile detention, Cuevas tagged his desk with the Roman numeral 14.

On November 3, 2010, Cuevas and another juvenile were making Farmero, or Huelga signs, with their hands, which is known as flashing or throwing gang signs.

On December 3, 2010, while in juvenile detention, Cuevas yelled, " 187[.] I'm a fucking Norte," the 187 in reference to the Penal Code section for murder.

On March 9, 2011, after a known Sureño and a known Norteño got into a verbal altercation, Cuevas initiated an attack on some Sureños and, in the aftermath, he continued yelling from his room, "Puro Norte! Fuck scrapas! Can't stop[,] won't stop! Good job to all the homies that got up and fucked a scrap." The seventh contact Vallin testified to occurred on April 5th, when Cuevas stepped out of line at the juvenile center and began attacking a known Sureño associate.[16] After the fight was broken up, he yelled, "South Side Locs," along with other gang slurs.

Finally, on August 31, 2012, during a contact with an officer in a known Norteño area in Hanford, Cuevas told an officer he had been a Norteño gang member for five years and he was born into the gang.

2. Analysis

In *Prunty*, the California Supreme Court held that "where the prosecution's case positing the existence of a single 'criminal street gang' for purposes of section 186.22[,

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15 Vallin explained that the 13th letter of the alphabet is M and the number 13 is associated with the Mexican Mafia. Gang members, especially younger ones, will cross out the number three as a sign of disrespect, as well as emphasize the letter N.

16 Vallin did not provide the year.

subdivision](f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets." (*Prunty*, *supra*, 62 Cal.4th at p. 71.) This showing demands more than a shared ideology or philosophy, a common name, a common enemy and/or common symbols. (*Id.* at pp. 70–72.) "The prosecution's evidence must permit the jury to infer that the 'gang' that the defendant sought to benefit, and the 'gang' that the prosecution proves to exist, are one and the same." (*Id.* at p. 75.) Thus, the prosecutor must adduce evidence that "allow[s] the jury to reasonably infer that the 'criminal street gang' the defendant sought to benefit—or which directed or associated with the defendant—included the 'group' that committed the primary activities and predicate offenses." (*Id.* at p. 76.)

In this case, as in *Prunty*, the prosecutor sought to prove defendant acted to benefit the larger Norteño gang, as we previously stated. (*Prunty*, *supra*, 62 Cal.4th at p. 82.) We therefore reject defendant's characterization of the criminal street gang at issue here as the VPH subset.

Also as in *Prunty*, here there was evidence that defendant self-identified both as a Norteño and as a VPH subset member, in addition to the evidence that he had Norteño tattoos, was contacted by law enforcement wearing Norteño colors and had engaged in Norteño versus Sureño gang fights. In *Prunty*, evidence of the defendant's self-identification as a Norteño was sufficient, and defendant fails to identify any basis for a finding that what sufficed in *Prunty* on the point of the defendant's Norteño membership fails to suffice here.[17] (*Prunty*, *supra*, 62 Cal.4th at pp. 82–83.) Rather, the focus of defendant's argument is the absence of proof that VPH is a criminal street gang within the meaning of the statute and we have rejected that position.

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17 The gang expert also testified to the primary activities of the larger Norteño gang. This was "likely sufficient" in *Prunty*, and defendant does not advance any contrary argument here. (*Prunty*, *supra*, 62 Cal.4th at p. 82.)

In this case, the critical issue is whether there is sufficient evidence linking the conduct underlying the predicate offenses to the larger Norteño gang. We are not convinced that the mere mention of gang subsets in this case, in the absence of evidence that every Norteño necessarily belongs to a subset and in the context of evidence of multiple self-admissions to Norteño gang membership, necessarily dictates a conclusion that the predicate offenses at issue in this case were committed by gang subsets Varrio Home Gardens and South Side Locs.

In *Prunty*, the evidence was limited to the gang expert's testimony that the predicate offenses were committed by different gang subsets. (*Prunty, supra*, 62 Cal.4th at pp. 69, 82–83.) As to the first predicate offense in this case, Lomeli claimed Varrio Home Gardens membership or association on two occasions, but also claimed Norteño membership or association on others, and the gang expert's testimony is silent regarding what subsets, if any, were claimed by the other men involved in the crime. Moreover, the gang expert did not opine that the crime was committed by Varrio Home Gardens or members of Varrio Home Gardens.

Similarly, regarding the second predicate offense, Cuevas yelled South Side Locs on one occasion in juvenile detention, but claimed Norteño membership on other occasions. The predicate offense of mayhem occurred in the county jail and the gang expert did not testify regarding whether Anthony Spalding, the other man involved in the slashing of Lopez's face, was a member of South Side Locs and/or whether the crime was committed by South Side Locs or South Side Locs members.

Thus, the evidence adduced in this case as to the predicate offenses appears distinguishable from that at issue in *Prunty*. However, we need not decide whether *Prunty* applies based on the mere invocation of a gang subset on a few occasions by Lomeli and Cuevas and/or the gang expert's general testimony regarding the fact subsets exist, again in the absence of any testimony that the predicate offenses were committed

by a particular subset or with other members of the subset, because the self-admission evidence in this case distinguishes it from the critical evidentiary omission in *Prunty*.

In *Prunty*, the defendant claimed membership in the Detroit Boulevard Norteños and also self-identified with the larger Norteño gang.[18] (*Prunty*, *supra*, 62 Cal.4th at pp. 67–68, 82.) The gang expert testified that the predicate offenses were committed by gang subsets Varrio Gardenland Norteños, Del Paso Heights Norteños and Varrio Centro Norteños, and that the subsets referred to themselves as Norteños; there was otherwise no additional evidence showing the subsets identified with the larger Norteño gang. (*Id.* at p. 69.) The gang expert "simply described the subsets by name, characterized them as Norteños, and testified as to the alleged predicate offenses." (*Id.* at p. 83.) Relevant here, the court explained in *Prunty* that mere evidence "that a local subset has represented itself as an affiliate of what the prosecution asserts is a larger organization" does not suffice (*id.* at p. 79), and it pointed out there was no evidence of self-identification by the subsets or their members with the larger Norteño gang[19] (*Prunty*, *supra*, at pp. 82–83).

In this case, there was evidence of self-identification with the larger Norteño gang as to both defendant and the individuals who committed the predicate offenses. Lomeli self-identified as Norteño on multiple occasions and during the commission of the

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18 As the court observed in *Prunty*, the evidence was also likely sufficient for the jury to infer that the defendant sought to benefit his subset in committing the crime at issue, but that was not the theory the prosecutor advanced. (*Prunty*, *supra*, 62 Cal.4th at p. 82, fn. 6.) In addition, the court observed that because there was no evidence linking the defendant's subset to the subsets involved in the predicate offense conduct, the existence of evidence from which it might also be inferred that the criminal street gang defendant sought to benefit was his subset did not alter the court's conclusion. (*Ibid.*)

19 In a footnote, the court observed that the gang expert's "testimony described conflict among the Norteño subsets he described. While this testimony would not prevent a jury form concluding that the subsets are associated [citation], it suggests that the fact finder could not place too much weight on the mere fact that the subsets called themselves 'Norteños.'" (*Prunty*, *supra*, 62 Cal.4th at p. 83, fn. 7.) Here, in contrast, the gang expert testified the subsets in Kings County all got along and he described it as a "melting pot" for the purpose of strength in numbers.

predicate offense, the involved gang members yelled, "Nortenos," while stabbing the victim. Vallin testified that attacking someone while yelling "Nortenos" is significant because it signals the attack is a gang crime. It also lets the victim and any witnesses, who may otherwise be unfamiliar with the gang members themselves, know that the attack, which is designed to instill fear and intimidation, is on behalf of the Norteños.

Cuevas also self-identified as a Norteño on multiple occasions and the circumstances of the predicate offense, which occurred in the Kings County Jail, evidence that it was committed on behalf of the Norteños rather than a subset. Vallin identified Cuevas and Spalding as Norteños, and the victim reported that he was attacked because the Norteños found out he was hanging out with a Norteño dropout while on the streets. Vallin testified the Norteños considered the victim "questionable" and they investigated the allegations that he was hanging out with a dropout. Vallin explained that to do so is an affront to the gang, as Norteño dropouts are viewed as scum. The victim was subsequently slashed across his face.

We conclude that the facts of this case are distinguishable from those underlying the decision in *Prunty* in a number of respects and here there was substantial evidence from which a jury could reasonably infer that it was members of the larger Norteño gang who engaged in the pattern of criminal activity (predicate offenses) at issue in this case. (*Prunty*, *supra*, 62 Cal.4th at pp. 75–76, 82–83.) We therefore reject defendant's claim that the evidence was insufficient under *Prunty*, mandating reversal of the enhancement. As we discuss next, however, much of the evidence was inadmissible under *Elizalde* and *Sanchez*, requiring us to determine whether defendant was prejudiced by its inclusion.

C. Admission of Evidence in Violation of *Elizalde* and *Sanchez*

1. Forfeiture

The People argue defendant forfeited his claim of evidentiary error by failing to object to the evidence at trial. However, "[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or

wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237–238; accord, *People v. Black* (2007) 41 Cal.4th 799, 810.) The California Supreme Court's recent decisions in *Elizalde* and *Sanchez* represented a significant change in the law and, under the circumstances, we find the People's forfeiture argument unpersuasive. (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7 (*Meraz*).)[20]

2. Un-Mirandized Booking Admissions

Concurrently with his Sixth Amendment and state law hearsay argument, defendant cites *Elizalde* and points out that the gang expert's testimony relied to a great extent on un-Mirandized booking statements.[21] We therefore begin with this issue.

"[U]nadmonished custodial interrogation implicates the Fifth Amendment," and "[i]n-custody defendants generally retain their Fifth Amendment protections even if the police have good reasons for asking un-*Mirandized* questions." (*Elizalde, supra,* 61 Cal.4th at p. 536.) In *Elizalde*, the California Supreme Court held that given officials' legitimate interests in reducing or preventing institutional violence, "it is permissible to *ask* arrestees questions about gang affiliation during the booking process." (*Id.* at p. 541.) However, where the officer should know the questions are reasonably likely to elicit an incriminating response, a defendant's answers to gang questions posed during the jail booking process, absent *Miranda* warnings, are inadmissible in the prosecution's

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20 The California Supreme Court granted review in *Meraz* on March 22, 2017, S239442, on grounds unrelated to the issues in this appeal, but the court ordered the opinion remain precedential. (Cal. Rules of Court, rule 8.1115(e)(3).)

21 Defendant has standing only to assert a violation of his own rights under the Fifth Amendment vis-a-vis booking admissions. (*People v. Leon* (2016) 243 Cal.App.4th 1003, 1016 (*Leon*), citing *People v. Badgett* (1995) 10 Cal.4th 330, 343.) Although he does not advance a specific argument to the contrary, he mentions the gang expert's partial reliance on his booking admissions and those of others being booked. To the extent defendant is suggesting he has a viable Fifth Amendment claim based on the prosecution's use of Lomeli's and Cuevas's booking admissions, he fails to explain why our decision in *Leon* is not controlling. (*Leon, supra,* at p. 1016.)

case-in-chief. (*Elizalde*, *supra*, at p. 541.) The officer's subjective intent is immaterial; the inquiry instead turns "on the nature of the charges the inmate is facing." (*Leon*, *supra*, 243 Cal.App.4th at p. 1015; accord, *Elizalde*, *supra*, at pp. 536, 538–540; *Villa-Gomez*, *supra*, 9 Cal.App.5th at pp. 536–537.)

In this case, the gang expert testified regarding four booking admissions made by defendant. The record permits us to discern the basis for defendant's arrest for two of the booking admissions: his admission to being a VPH Norteño following his arrest for battery with a gang enhancement on July 9, 2004, and his admission to being a Norteño following his arrest on June 9, 2013, for the crimes at issue in this appeal. (*Elizalde*, *supra*, 61 Cal.4th at pp. 536, 538–540; *Leon*, *supra*, 243 Cal.App.4th at p. 1015.) For the other two booking admissions, the record is silent regarding the basis for arrest, or any other facts from which we might determine whether the questions were likely to elicit an incriminating response.

While we do not find defendant forfeited his claim given the state of the law at the time of trial, his failure to object to the testimony he now seeks to challenge leaves us with an undeveloped record. (*Sanchez*, *supra*, 63 Cal.4th at p. 697–698; *People v. Ochoa* (2017) 7 Cal.App.5th 575, 584–585 (*Ochoa*).) Despite citing to *Elizalde*, defendant fails to address whether, at the time of booking, the officer should have known the questions were reasonably likely to elicit an incriminating response. As defendant bears the burden of affirmatively demonstrating error (*People v. Gamache* (2010) 48 Cal.4th 347, 378; *People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1523; *People v. Clifton* (1969) 270 Cal.App.2d 860, 862), we find that burden unmet with respect to his Fifth Amendment challenge to the booking admissions of March 9, 2006, and November 28, 2007. As discussed, *post*, these two booking admissions are nevertheless inadmissible hearsay

under state law, along with the two admissions inadmissible under *Elizalde*.[22] (*Sanchez*, *supra*, at p. 686.)

3. Hearsay

Following the decision in *Sanchez*, "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) "If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Ibid.*)

Thus, "a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* [23] limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term." (*Sanchez*, *supra*, 63 Cal.4th at p. 680.)

The court discussed at length what constitutes testimonial hearsay in *Sanchez*, explaining, "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing

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22 We previously considered and rejected the argument that booking admissions implicate the Sixth Amendment. (*Leon*, *supra*, 243 Cal.App.4th at p. 1020.) The parties advance no specific arguments on this issue and, therefore, our decision in *Leon* is controlling.

23 *Crawford v. Washington* (2004) 541 U.S. 36.

emergency or some other purpose unrelated to preserving facts for later use at trial." (*Sanchez*, *supra*, 63 Cal.4th at pp. 689, fn. omitted, 691–694.) Additionally, the formality of the statement is considered. (*Id.* at pp. 692–694; *Ochoa*, *supra*, 7 Cal.App.5th at p. 583.)

Viewed now through the lens of *Sanchez*, the gang expert clearly relied on inadmissible hearsay during case-specific portions of his testimony relating to defendant and, as addressed *post*, the individuals who committed the predicate offenses. (*Lara*, *supra*, 9 Cal.App.5th at p. 337; *Ochoa*, *supra*, 7 Cal.App.5th at p. 583.) Of the hearsay admitted in violation of state law, some was also testimonial and, therefore, violated the confrontation clause.[24] The remainder, as we shall explain, may or may not have been testimonial, but the record does not allow for a determination. (*Ochoa*, *supra*, at pp. 584–585.)

a. Evidence of Defendant's Gang Membership

In support of his opinion that defendant is a Norteño, Vallin relied on documentation of 10 contacts or events, not one of which involved Vallin personally. Four of the 10 were booking admissions, two related to incidents following which defendant was arrested, two related to information documented on field information cards following contacts between police and defendant, one involved defendant's registration as a gang member pursuant to court order under section 186.30, and one involved a 2011 conviction by plea of assault with a deadly weapon and the now-dismissed substantive gang offense. (Evid. Code, § 452.5; *People v. Skiles* (2011) 51 Cal.4th 1178, 1186; *Ochoa*, *supra*, 7 Cal.App.5th at p. 589, fn.10.)

Defendant's 2011 conviction was supported by a certified copy of the abstract of judgment (Evid. Code, § 452.5; *People v. Skiles*, *supra*, 51 Cal.4th at p. 1186; *Ochoa*,

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[24] Unavailability and cross-examination or forfeiture are not issues advanced by the parties. (*Sanchez*, *supra*, 63 Cal.4th at p. 680.)

supra, 7 Cal.App.5th at p. 589, fn. 10.), but Vallin's testimony regarding the remainder of the contacts relied on hearsay evidence (*Sanchez*, *supra*, 63 Cal.4th at pp. 680–686). At least two of the police contacts related to events that culminated in defendant's arrest and, therefore, the record is minimally sufficient for us to conclude that those contacts concerned completed crimes. As the People mount no argument to the contrary, in accordance with *Sanchez*, we assume they constitute testimonial hearsay. (*Id.* at pp. 694–695; *Lara*, *supra*, 9 Cal.App.5th at p. 337; *Ochoa*, *supra*, at pp. 585–586 & fn. 8.) We cannot simply assume that all contacts with law enforcement are testimonial, however, and because defendant failed to object at trial, the record is undeveloped on this point. (*Sanchez*, *supra*, at pp. 694–698; *Ochoa*, *supra*, at p. 585.) As previously stated, defendant bears the burden of affirmatively demonstrating error on appeal and other than the two contacts related to defendant's arrest, we find that burden unmet. (*Sanchez*, *supra*, at p. 697; *Ochoa*, *supra*, at pp. 584–585.) Because we must address the errors under the constitutional standard, however, as discussed, *post*, any further parsing of the issue is unnecessary. (See *Sanchez*, *supra*, at pp. 697–698.)

b. Evidence Relating to Predicate Offenses

During oral argument, the People raised the issue of Vallin's testimony regarding Lomeli and Cuevas and contended it was general background information permissible under *Sanchez*. (*Sanchez*, *supra*, 63 Cal.4th at pp. 680–686.) We disagree.

In *Sanchez*, the California Supreme Court defined case-specific facts as "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) However, the appeal in *Sanchez* concerned a hearsay challenge to statements introduced as evidence of the defendant's own gang background. (*Id.* at pp. 672, 674.) Although the court mentioned the gang expert "testified about convictions suffered by two Delhi [gang] members to establish that Delhi [gang] members engaged in a pattern of criminal activity" (*id.* at p. 672), the depth of the expert's testimony concerning the predicate offenses is unclear, nor was that

specific testimony one of the issues confronting the court (*id.* at pp. 670, 672; see *People v. Delgado* (2017) 2 Cal.5th 544, 590 ["'It is axiomatic … that a decision does not stand for a proposition not considered by the court.'"]).

Moreover, the definition of case-specific facts articulated in *Sanchez* should not be divorced from its context and viewed in isolation. As the court explained more fully, "The hearsay rule has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise." (*Sanchez, supra*, 63 Cal.4th at p. 676.) "By contrast, an expert has traditionally been precluded from relating *case-specific* facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried. Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge." (*Ibid.*)

Several Courts of Appeal have since addressed this issue. In *Meraz*, the court stated that the gang expert's general background testimony "plainly" included testimony about the gang's pattern of criminal activities, which the court described as "unrelated to [the] defendants or the current shooting and mirrored the background testimony the expert gave in *Sanchez*." (*Meraz, supra,* 6 Cal.App.5th at p. 1175.) In *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, the Court of Appeal quoted *Meraz* for this proposition in a case in which the defendant broadly challenged the gang expert's testimony in a "scattershot approach." *(People v. Vega-Robles, supra,* at pp. 410–411.)

In contrast, in *Ochoa*, the court concluded the testimony regarding the individuals involved in the predicate offenses was case-specific, stating, "It seems clear the hearsay statements at issue in the present case—out-of-court statements by individuals admitting

being members of the [South Side Locos]—are case-specific hearsay rather than general background information about the [South Side Locos]." (*Ochoa, supra,* 7 Cal.App.5th at pp. 588–589.) The court in *Lara*, too, treated the gang expert's testimony regarding the predicate offenses as case-specific. (*Lara, supra,* 9 Cal.App.5th at p. 337.)

The People focused during argument on the single sentence in *Sanchez* describing case-specific facts, a basis we find insufficient to persuade us that Vallin's testimony regarding the predicate offenses in this case was merely general background information. As an element of the gang enhancement, the prosecutor was required to prove the existence of a criminal street gang and that in turn required she show, in relevant part, a pattern of criminal activity. (*People v. Hernandez, supra,* 33 Cal.4th at p. 1047.) Thus, Vallin's testimony regarding the predicate offenses, and Lomeli and Cuevas's law enforcement contacts, related to an element of the gang enhancement. Under these circumstances, we are not convinced that this testimony may be fairly described as background information; that is, "testimony regarding [Vallin's] general knowledge in his field of expertise." (*Sanchez, supra*, 63 Cal.4th at p. 676; see *People v. Stamps* (2016) 3 Cal.App.5th 988, 995–996.) We believe this conclusion is consistent with and follows from the court's discussion of case-specific facts versus general background information in *Sanchez*. Therefore, we conclude that Vallin's testimony regarding the predicate offenses, and Lomeli and Cuevas, was case-specific. (*Sanchez, supra*, at pp. 676–677; *Lara, supra,* 9 Cal.App.5th at p. 337; *Ochoa, supra,* 7 Cal.App.5th at pp. 588–589; *People v. Stamps, supra,* at pp. 995–996.)

Turning to the first predicate, the fact of Lomeli's juvenile conviction for assault with a deadly weapon was shown through the admission of certified court documents. Vallin testified that the crime was committed by four Norteños, including Lomeli, and the group yelled "Nortenos" during the stabbing. Although Vallin was the investigating detective and would presumably have personal knowledge regarding some aspects of the case, it is not clear from the record whether all, some or none of his testimony was based

on firsthand knowledge or was obtained from written reports. It appears, however, that Vallin was relying on investigation reports given the prosecutor's reference to report numbers, and any written reports would present one layer of hearsay; any additional statements therein would present a second layer if offered for the truth of the matter asserted. (*Sanchez, supra,* 63 Cal.4th at pp. 674–675.) The statement "Norteños," therefore, may itself present an additional layer of hearsay.[25] (*Ibid.*) Moreover, any hearsay may also be testimonial, given that these facts related to the investigation of a completed crime. (*Id.* at pp. 694–695; *Lara*, *supra*, 9 Cal.App.5th at p. 337.) In light of Vallin's personal involvement in the investigation and our inability to determine the basis for his testimony from the record, we conclude that defendant failed to meet his burden of demonstrating error on appeal with respect to Vallin's testimony the crime was committed by Lomeli and three other Norteños.[26]

Vallin was also personally involved in the contact on May 25, 2011. Vallin encountered Lomeli at the park and documented on a field interview (FI) card that Lomeli was wearing gang attire and had written H-F-D on his hand.[27] Vallin's testimony

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25 The evidence that the group yelled "Nortenos" is hearsay (offered for the truth) if it is offered as a shorthand statement that "We are Norteños." On the other hand, if it were offered to show only that Norteño gang members commonly yell "Norteños," then it would not be offered for the truth since the word "Norteños," standing alone, is not capable of being true or false. If offered for this nonhearsay purpose, it would be treated the same as if they yelled "14" or "Red," signifying the gang's identifying number and color, since neither the number 14 nor the color red, standing alone, is capable of being true or false. Regardless of whether the word "Norteños" in this context is hearsay or not, the written investigation reports noting that these individuals yelled "Nortenos" are hearsay.

26 Separately, we observe that the record is silent regarding the basis for Vallin's opinion that the crime was committed by Norteños. Given that he was the investigating detective, it appears that any deficiency as to this specific point was foundational and the failure to object on that ground forfeited any claim of error on appeal. (Evid. Code, § 353; e.g., *People v. Clark* (1992) 3 Cal.4th 41, 125–126, abrogated on other grounds recognized in *People v. Pearson* (2013) 56 Cal.4th 393, 462.)

27 Vallin explained that officers fill out FI cards when they have contact with someone they suspect is a gang member. The cards are used to document the individual's basic information such as name, date of birth, address, phone number and employment information, along with any

regarding defendant's statement about his cousins and the remainder of Lomeli's contacts with law enforcement rely on hearsay evidence, but the state of the record does not permit us to determine whether it was also testimonial hearsay. (*Sanchez, supra,* 63 Cal.4th at pp. 697–698; *Ochoa, supra,* 7 Cal.App.5th at pp. 584–585.)

Finally, regarding the second predicate offense, the fact of Cuevas's conviction for mayhem was demonstrated through the admission of a certified abstract of judgment. However, Vallin was not personally involved in any of the contacts between Cuevas and law enforcement and, therefore, his testimony relating the facts underlying the mayhem conviction necessarily relied on hearsay evidence and that hearsay appears to have been testimonial given that it related directly to the crime for which Cuevas was convicted. (*Sanchez, supra,* 63 Cal.4th at pp. 694–695.) Vallin's testimony regarding the remaining contacts relied on hearsay evidence as well but given the undeveloped record, we cannot conclude that it was testimonial. (*Id.* at pp. 697–698; *Ochoa, supra,* 7 Cal.App.5th at pp. 584–585.)

4. Prejudice

Having concluded that much of Vallin's testimony regarding defendant, Lomeli and Cuevas was admitted in violation of state law and some was also admitted in violation of the Fifth and Sixth Amendments, we evaluate the cumulative effect of these errors under the *Chapman* standard of review. (*People v. Houston, supra,* 54 Cal.4th at p. 1233; *People v. Woods* (2006) 146 Cal.App.4th 106, 117; see *People v. Hill* (1998) 17 Cal.4th 800, 844; *Sanchez, supra,* 63 Cal.4th at p. 699; *Leon, supra,* 243 Cal.App.4th at p. 1020.) "'To say that an error did not contribute to the ensuing verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in

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gang related tattoos, any statements made or any persons in the individual's company at the time of the contact. Vallin testified that there is a 10-point criteria for gang affiliation on the back of the card. After officers complete FI cards, they turn them over to their respective departments, which upload them to the department database and forward them to the gang task force, which then uploads them to a separate database.

question, as revealed in the record.' [Citation.] Thus, the focus is what the jury actually decided and whether the error might have tainted its decision." (*People v. Neal* (2003) 31 Cal.4th 63, 86; *Leon, supra*, at p. 1020.) We consider "not only the evidence that would support the judgment, but also the impact of the inadmissible evidence on the final outcome." (*People v. Gonzalez* (2012) 210 Cal.App.4th 875, 884.)

Determining whether the error was prejudicial "requires an examination of the elements of the gang enhancement and the gang expert's specific testimony." (*Sanchez, supra*, 63 Cal.4th at p. 698.) Relevant here, the prosecution was required to prove defendant committed the crimes "[(1)] for the benefit of, at the direction of, or in association with any criminal street gang, [and (2)] with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b).) As previously discussed, to prove the existence of a "criminal street gang" within the meaning of the statute, the prosecution was also required to prove, in relevant part, that members of the gang individually or collectively engaged in the commission of at least two predicate offenses. (§ 186.22, subd. (f); see *People v. Gardeley* (1996) 14 Cal.4th 605, 623, disapproved on other grounds in *Sanchez, supra*, at p. 686, fn. 13; *Ochoa, supra*, 7 Cal.App.5th at p. 581.)

In this case, although there was some admissible nonhearsay evidence on the issues of predicate offenses and gang membership, an overwhelming amount of evidence as to gang membership or affiliation was admitted in violation of both *Elizalde* and *Sanchez*. Most of Vallin's testimony regarding Lomeli's contacts with law enforcement relied on hearsay evidence, and other than the fact of Cuevas's mayhem conviction, Vallin's testimony regarding the facts of that crime and all of his testimony regarding Cuevas's contacts with law enforcement was hearsay. Finally, the gang expert's opinion that defendant was a Norteño was based on his tattoos, four booking admissions and a number of contacts with law enforcement. Other than the tattoos and evidence of defendant's prior conviction for assault with a deadly weapon and a substantive gang

offense, the remainder of this evidence was hearsay evidence. Of that evidence, two booking admissions were admitted in violation of the Fifth Amendment under *Elizalde* and although the record is not well developed, a few of the law enforcement contacts appear to be testimonial in nature.

Our inquiry here is one of prejudice and, while there was other evidence of defendant's gang involvement adduced at trial by virtue of Robledo's testimony and defendant's testimony, the prejudicial effect of the inadmissible evidence undermines our confidence in the jury's true findings as to the gang enhancement allegations.[28] Given the amount of evidence admitted in error and the impact of that evidence, we cannot conclude that the error was harmless beyond a reasonable doubt. (*Sanchez*, *supra*, 63 Cal.4th at p. 699.) We therefore reverse the jury's findings as to the gang enhancement.

IV. Admission of Gang Evidence in Violation of Evidence Code Section 352 and the Due Process Clause

Defendant also argues that the admission of the gang evidence in this case violated Evidence Code section 352, and the due process clause. The People respond that defendant forfeited this claim by failing to object. In reply, defendant points out that he addressed the forfeiture issue through incorporation by reference of the futility argument he advanced with respect to his failure to object on confrontation clause grounds.

While we concluded, *ante*, that an objection to the gang expert's testimony on Fifth Amendment, hearsay and/or confrontation clause grounds would have been futile

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[28] During oral argument, the People stated that the requisite predicate offenses could be supplied by defendant's 2011 conviction for assault and the crimes for which he was convicted in this case. The 2011 conviction cannot be relied on because defendant withdrew his plea and the People dismissed the charge, as discussed in part VII. of the Discussion, *post*. However, assuming the People's argument was directed at addressing predicate offenses undermined by their reliance on evidence inadmissible under *Sanchez* (*Lara*, *supra*, 9 Cal.App.5th at p. 337), and assuming the jury could have relied on defendant's convictions in this case (*Ochoa*, *supra*, 7 Cal.App.5th at pp. 584–585), our decision here turns not specifically on the presence or absence of at least two predicate offenses, but on the overall impact of the inadmissible evidence (*People v. Gonzalez*, *supra*, 210 Cal.App.4th at p. 884).

given the state of the law at that time, it does not necessarily follow that the same may be said about an objection on Evidence Code section 352 grounds. A defendant's failure to object to evidence on Evidence Code section 352 grounds at trial generally forfeits that argument on appeal, absent an objection on a basis sufficient to preserve the claim for appeal. (*People v. Valdez* (2012) 55 Cal.4th 82, 138–139; *People v. Partida* (2005) 37 Cal.4th 428, 433–435.) In this case, defendant did not object to the gang evidence on grounds of prejudice or on any other ground that might have preserved this issue for appeal. Additionally, the argument he did advance on appeal—that a confrontation clause objection would have been futile—does not suffice to explain why an objection to the evidence under Evidence Code section 352 would have been futile. The consequence of failing to object during trial applies to defendant's due process claim as well. (*People v. Partida, supra,* at pp. 435–436; *People v. Carter* (2003) 30 Cal.4th 1166, 1201.) Accordingly, we find this claim forfeited.[29]

V. Cumulative Error

As well, defendant argues the cumulative impact of the errors he has raised on appeal resulted in prejudice to him and require reversal of his convictions. We disagree.

"In examining a claim of cumulative error, the critical question is whether [the] defendant received due process and a fair trial. [Citation.] A predicate to a claim of cumulative error is a finding of error." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068; see *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) While we found error in

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29 We observe that, in any event, while gang evidence is inherently prejudicial, the evidence was relevant to the charged gang enhancement in this case, as related to defendant's motive and intent, and the predicate offenses the prosecutor was required to prove. (*People v. Tran* (2011) 51 Cal.4th 1040, 1048–1050.) Moreover, we reversed the gang enhancement on other grounds. Given that there is no dispute defendant fired three shots into an occupied vehicle carrying Robledo and three other people, and in light of other admissible evidence of defendant's and Robledo's gang association, there is no merit to a claim that, as to defendant's convictions for attempted murder and shooting into an occupied vehicle, the challenged gang evidence "resulted in a miscarriage of justice" (*People v. Winbush* (2017) 2 Cal.5th 402, 469) or a "fundamentally unfair" trial (*People v. Partida, supra,* 37 Cal.4th at p 436).

the admission of some of the gang expert's testimony under *Elizalde* and *Sanchez* and reversed the gang enhancement as a result, we rejected defendant's other claims of error. Further, as we observed in conjunction with defendant's previous claim, we find no merit in an assertion that this error so tainted the trial that defendant was convicted of attempted murder and shooting at an occupied vehicle in the absence of a fair trial. Accordingly, we reject defendant's claim of cumulative error.

VI. Applicability of Section 654 to Sentence on Count 2

Defendant argues that the trial court erred in failing to stay his sentence under section 654 for shooting at an occupied vehicle because it arose out of a course of conduct indivisible from the attempted murder of Robledo. The People respond that because the trial court relied on the multiple victims exception to section 654, it did not err in failing to stay the sentence.

"Subdivision (a) of section 654 provides that '[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.' This provision 'protects against multiple punishment, not multiple conviction. [Citation.]' [Citation.] Although it 'literally applies only where such punishment arises out of multiple statutory violations produced by the "same act or omission,"' we have extended its protection 'to cases in which there are several offenses committed during "a course of conduct deemed to be indivisible in time."'" (*People v. Oates* (2004) 32 Cal.4th 1048, 1062.)

However, it has long been established "that 'the limitations of section 654 do not apply to crimes of violence against multiple victims.'" (*People v. Oates, supra,* 32 Cal.4th at p. 1063; accord, *People v. Correa* (2012) 54 Cal.4th 331, 341; *People v. Dydouangphan* (2012) 211 Cal.App.4th 772, 781.) "'The purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability. A defendant who commits an act of violence

with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person.'" (*People v. Oates*, *supra*, at p. 1063.) "'This distinction between an act of violence against the person that violates more than one statute and such an act that harms more than one person is well settled. Section 654 is not "... applicable where ... one act has two results each of which is an act of violence against the person of a separate individual."'" (*Ibid.*)

In declining to stay the sentence under section 654, the court recognized that while the attempted murder victim was Robledo, defendant fired three shots into the rear window of a vehicle carrying Robledo and his girlfriend, their young child and Robledo's sister. Because the crime endangered three people in addition to the intended victim of the attempted murder, the court determined section 654 did not apply.

Defendant advances no argument addressing the multiple victims exception relied on by the trial court nor do we discern any basis under which it would not apply here. Defendant cites to *People v. Sok* (2010) 181 Cal.App.4th 88, 99–100 (*Sok*) in support of his argument that his sentence should have been stayed. We recognize that in *Sok*, the Court of Appeal concluded that the defendant "could not be sentenced for both attempted murder and shooting at an occupied vehicle" (*id.* at p. 100), and that case, like this one, involved multiple victims[30] (*Sok*, *supra*, at pp. 91–93). However, the multiple victims exception was not an issue addressed by the Court of Appeal in *Sok* (*id.* at pp. 99–100), and "[i]t is axiomatic that cases are not authority for propositions not considered" (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10). Accordingly, in reliance on the long line of cases recognizing the multiple victims exception under section 654, we find no error.

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30 In *Sok*, the defendant fired several shots into a vehicle carrying four people. (*Sok*, *supra*, 181 Cal.App.4th at p. 91.) The jury convicted him, in relevant part, of the attempted murders of two of the occupants, but was unable to reach verdicts on the attempted murder counts relating to the other two occupants. (*Id.* at p. 92.) The prosecutor subsequently dismissed those two counts. (*Ibid.*)

(See *Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455 [Courts of Appeal bound by higher court decisions].)

VII. Prior Felony Conviction Vacated and Charge Dismissed

In a supplemental brief, defendant argues that the prior strike conviction and prior prison term findings must be vacated and this matter remanded for resentencing because the prior felony conviction that formed the basis for the strike and prior prison term allegations was dismissed. The People concede the merit of this argument.[31]

As the parties agree, the prior strike allegation and the prior prison term allegation were both based on defendant's prior conviction for violation of section 186.22, subdivision (a), on August 22, 2011. Defendant's motion to withdraw his guilty plea to that offense was granted and the prosecution subsequently dismissed the charge based on insufficient evidence. Accordingly, given that the underlying conviction upon which those allegations was based was vacated and the charge dismissed, the enhancements must be stricken and this matter remanded for sentencing.[32]

VIII. Errors in Abstract of Judgment

The remaining issue pertains to the amended abstract of judgment. A trial court's oral judgment controls and "[w]hen an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, this court has the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties." (*People v. Jones* (2012) 54 Cal.4th 1, 89.) As there is no disagreement here regarding the existence of errors in the abstract of judgment, we turn to those errors.

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31 The People's concession was dependent upon the receipt of certified document copies from San Joaquin County. That deficiency was subsequently cured.

32 Our resolution of this issue renders moot additional issues arising from reflection in the amended abstract of judgment of the imposition and stay of an enhancement pursuant to section 667.5, subdivision (b), and the absence of evidence in the record that the jury made a finding defendant served a prior prison term.

Defendant initially raised the issue of errors in the abstract of judgment in his opening brief. The trial court subsequently issued an amended abstract of judgment in response to a letter from defendant's appellate counsel, sent in "the spirit of *People v. Fares* (1993) 16 Cal.App.4th 954, and the terms of *People v. Clavel* (2002) 103 Cal.App.4th 516 …."[33] Appellate counsel then sent a second letter to the trial court on the ground that while the amended abstract of judgment reflects some corrections, it still contains errors. In response, the People sent a letter to the trial court informing it that the issue was fully briefed and pending before this court.

We summarized defendant's sentence at the beginning of the opinion. The remaining error identified by defendant is the reflection of a 10-year sentence enhancement to count 2 pursuant to section 186.22, subdivision (b)(1)(C). The trial court imposed a gang enhancement to count 2 pursuant to section 186.22, subdivision (b)(4)(B), resulting in a sentence of 15 years to life. The reflection in the amended abstract of imposition of an additional and separate 10-year gang enhancement pursuant to section 186.22, subdivision (b)(1)(C), is therefore erroneous and subject to correction on remand.

DISPOSITION

The Penal Code section 186.22, subdivision (b), gang enhancement is reversed as to both counts, and the prior strike and prior prison term findings are stricken. After the filing of the remittitur in the trial court, the People shall have 30 days in which to file a written election to retry defendant on the section 186.22, subdivision (b), enhancement allegations. If they do not timely file such an election, and/or do not bring defendant to

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33 In *People v. Fares, supra*, 16 Cal.App.4th at page 960, the Court of Appeal "urge[d] counsel presented with apparent error in the calculation of presentence custody credits to attempt correction in the trial court before elevating the issue to the stature of formal appeal. If the dispute cannot be resolved by motion in the superior court, appeal is always available." In *People v. Clavel, supra*, 103 Cal.App.4th at page 517, the appellate court dismissed an appeal seeking relief from a presentence credit miscalculation where the defendant failed to seek relief first from the trial court.

retrial on said allegations within the time set forth in Penal Code section 1382, subdivision (a)(2)—60 days unless waived by defendant—the trial court shall proceed to resentence defendant. Upon resentencing (whether or not following retrial), the trial court shall issue an amended abstract of judgment that includes the corrections ordered herein: omission of the 10-year sentence enhancement to count 2 pursuant to section 186.22, subdivision (b)(1)(C), and omission of the prior prison term enhancement pursuant to Penal Code section 667.5. An amended abstract of judgment shall then be forwarded to the appropriate authorities.

The judgment of conviction is otherwise affirmed.

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KANE, Acting P.J.

WE CONCUR:

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POOCHIGIAN, J.

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FRANSON, J.